Michael K. Jeanes, Clerk of Court
*** Filed ***
04/19/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000026-001 DT 04/17/2013

CLERK OF THE COURT
COMMISSIONER MYRA HARRIS J. Eaton
Deputy

JOSEPH MAJIO SAYEGH

JOSEPH MAJIO SAYEGH
13601 N 32ND ST
PHOENIX AZ 85032

v.

ALMA P ORDAZ (001)
MARIA P ORDAZ (001)

ALMA P ORDAZ
4002 W WOOD DR
PHOENIX AZ 85029
MARIA P ORDAZ
4002 W WOOD DR
PHOENIX AZ 85029

MANISTEE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC201-144495.

Defendants-Appellants Alma P. Ordaz and Maria P. Ordaz (Defendants) appeal the Manistee Justice Court's determination that they were guilty of a detainer action. Defendants contend the trial court erred. For the reasons stated below, the court affirms in part and reverses in part the trial court's judgment.

I. FACTUAL BACKGROUND.

On July 25, 2012, Plaintiff filed an eviction action and alleged the non-payment of rent. Plaintiff requested past due rent of $1,350.00 plus late fees of $1,050.00; rental concessions of $1,350.00; and damages and other charges of $1,000.00. The two defendants plus a John Doe and a Mathew Byrne were originally included on the Summons. Mr. Byrne was later dismissed from the action. Prior to filing the Complaint, Plaintiff filed a 5-day Notice to Defendants Alma P. Ordaz and Maria P. Ordaz informing them they owed $1,350.00 in past due rent, late charges of $850.00 and a partial late fee payment of $400.00. The 5-day notice informed Defendants the total—$1,800.00—was exclusive of future accruing costs and late fees would continue to accrue. The 5-day notice stated the fifth day would fall on July 25, 2012, and, as an alternative to payment, Defendants could vacate the premises on or before the fifth day. The notice stated vacating the premising would not relieve Defendants from liability for the outstanding balance. The notice was hand delivered to Defendants at 7:20 P.M. on July 20, 2012.

Plaintiff also filed a Notice of Non-Renewal of Lease the same day he filed his 5-day Notice—July 20, 2012,—informing Defendants their lease would expire on September 1, 2012, and would not be renewed. This notice informed Defendants that Plaintiff would refund the balance of any security deposit after deducting costs for unpaid rent and repairs. The security deposit was for $1,000.00. Defendants were told they were required to return all keys when they vacated the premises.

The trial court held a trial on August 2, 2012, and Plaintiff prevailed. Thereafter, Defendants filed for Rule 60(c) relief from the judgment. On August 31, 2012, the trial court set aside the judgment and dismissed Defendant Byrne from the case. The matter was set for a new trial. The trial court held a bench trial on September 13, 2012.

At trial, the trial court explained this was an eviction action and would be limited to rent issues.[1] The trial court added it would not be considering damage requests.[2] Plaintiff's wife—Mrs. Sayegh—was the first witness to testify and stated Defendants did not pay rent in July.[3] She said Defendants paid a $400.00 check through their attorney, to pay for June's late fee as the June rent was not paid until June 15.[4] She maintained Plaintiff had not accepted any payment for July's rent.[5]

On cross-examination, Mrs. Sayegh asserted the contract provides for a $50.00 per day late fee.[6] She added she understood the late fee was an "overestimated" amount but said the $50.00 per day late fee was on the contract and Defendants signed it.[7]She explained the June payment was made on June 15, and the additional $400.00 which she received in July was to cover the late fees for June.[8] She clarified she accepted the check to cover the late fees for June.[9] The witness asserted that nothing was paid on July 1.[10]

Plaintiff testified he was asking for (1) rent for July and August; as well as (2) the late fees.[11] The trial court asked for specific amounts and Plaintiff requested (1) July rent of $1,350.00; (2) August rent of $1,350.00; (3) late fees of $1,500.00 which represented 30 days at $50.00 per day; (4) court costs of $283.00; and (5) the "lease conditions" which consisted of the carpet cleaning cost of $390.00 plus the cleaning fee of $185.00.[12]

---

[1] Audio transcript, September 13, 2012, at 11:08:36–11:09:10.
[2] *Id*. at 11:08:42–11:09:10.
[3] *Id*. at 11:13:16–20.
[4] *Id*. at 11:13:23–43.
[5] *Id*. at 11:13:43–48.
[6] *Id*. at 11:14:16–20.
[7] *Id*. at 11:14:20–26.
[8] *Id*. at 11:14:26–11:15:02.
[9] *Id*. at 11:15:02–15.
[10] *Id*. at 11:15:15–19.
[11] *Id*. at 11:15:47–57.
[12] *Id*. at 11:16:00–11:18:28. The term of the tenancy begins on the first of the month. The lease specifically provides: "Tenant agrees to accept the property in its current condition and to return it in 'moving-in clean' condition, or to pay a special cleaning charge of $185.00 upon vacating the premises. The carpets are to be professionally cleaned. If you prefer that we have the carpets cleaned for you, the charge will be billed to you. Carpet cleaning cost is in addition to cleaning charge."

On cross-examination, Defendant asked why August rent was claimed and Plaintiff responded Defendant did not turn the keys back until August when they returned the keys "right in front of the judge over here" on August 2.[13] Plaintiff also explained he filed a 5 day notice on July 20, giving Defendants the opportunity to either pay the July rent plus late fees for July, or quit the premises.[14] Defendant asked why Plaintiff did not show up at the premises to do a walk through on August 1, and Plaintiff replied he went to the premises but "Matt" would not let him enter.[15] Plaintiff then testified "he" called at 10:30 P.M. to ask Plaintiff to return to the premises but Plaintiff was at a movie and could not come.[16]

Defendant called Matthew Bryne to testify. Mr. Bryne said he lived at the premises for 23 months with Defendant's mother and Defendant's children.[17] He said he was "the conduit to Joe"—the Plaintiff.[18] Mr. Bryne stated a portion of the rent—$400.00—was paid in July.[19] He said the payment had nothing to do with late fees[20] which were "accrued and assessed by Joe depending on the date that he got all of his money"[21] and in previous months they paid an exorbitant late fee to Joe.[22] The witness added the payment could not be late fees because it had not been determined that they were late.[23]

Defendant asked Mr. Bryne about the key return and he replied (1) he agreed to have the family move out by July 30; (2) the family did move on July 30; (3) this left July 31 and August 1 for the cleanup; (4) they touched up the paint with paint provided by Plaintiff's maintenance man although the paint did not match; (5) six people worked on the house; (6) the carpets were cleaned every other month by Chem-Tri; (7) the last cleaning occurred in April; and (8) on July 31, Plaintiff came by the house and Mr. Bryne would not allow him to enter as the cleaning was going on and Mr. Bryne said they would do a walk-through the following day.[24] Mr. Bryne said Plaintiff agreed to this on August 1, and Defendants kept their word.[25] Mr. Bryne added Plaintiff knew Defendants would be working late and explained they were working late to leave the property "per our turnover date in the best possible condition that we could leave it in."[26] He added that five days to move "in this heat" was the "best this household could do."[27]

. . . .

[13] Audio transcript, *id*. at 11:18:48–11:19:07.
[14] *Id*. at 11:19:08–11:20:52.
[15] *Id*. at 11:20:56–11:21:22.
[16] *Id*. at 11:21:28–57.
[17] *Id*. at 11:23:16–21.
[18] *Id*. at 11:23:27–30.
[19] *Id*. at 11:23:30–41.
[20] *Id*. at 11:23:41–45.
[21] *Id*. at 11:23:45–52.
[22] *Id*. at 11:23:52–11:24:01.
[23] *Id*. at 11:24:10–16.
[24] *Id*. at 11:24:59–11:27:32.
[25] *Id*. at 11:27:33–40.
[26] *Id*. at 11:27:40–11:28:07.
[27] *Id*. at 11:28:07–31.

Mr. Bryne testified they were evicted for non-payment of rent "which we highly dispute" and explained they disputed this because they had been late on the rent other times and paid "prohibitive fees."[28] He added this was no different than other times and "when they checked their check register" one could see that not only was the rent paid, but late fees were also paid.[29]

On cross-examination Plaintiff showed Mr. Bryne copies of two checks and Mr. Bryne identified the June 15, $600.00 check by saying: "I don't know what this is. This says on the check balance of rent. This would represent to me whatever it was owed in terms of a shortage of rent plus late fees."[30] He also testified the $400.00 check was Plaintiff's partial payment for rent for that month (July) and was not the late fee.[31] When Plaintiff asked about stains on the carpet, Mr. Bryne added he shared with Plaintiff that Defendants did not have time to have the carpet cleaned because of the short notice.[32] Plaintiff asked Mr. Bryne why the rent was not paid in July, and Mr. Bryne responded Plaintiff knew why the rent was not paid—they did not have the money at that time.[33]

Alma Ordaz testified about the condition of the carpet and the touch-up paint when they moved in.[34] Before beginning his cross-examination, Plaintiff objected to Ms. Ordaz' testimony on relevance and asserted Ms. Ordaz' testimony had nothing to do with why the parties were present in court which was limited to why Defendants failed to pay the rent.[35] Plaintiff asked if Ms. Ordaz made a written complaint about the paint when Defendants moved in and Ms. Ordaz said she had not.[36]

After closing argument the trial court asked Plaintiff how he determined the $400.00 check on July 7, was for late fees.[37] Because Plaintiff's wife asserted Plaintiff did not understand the trial court's question, the trial court allowed Ms. Sayegh, to resume the witness stand. She stated (1) the $400.00 was late fees for the June payment; (2) on the lease it states that if you are late there is a $50.00 late fee every month; (3) Defendants did not request a receipt; (4) if Defendants had requested a receipt, Plaintiff would have handed them a receipt; (5) in July, they gave Defendants until July 20, to come and make their payment (6) on July 20, Defendants were notified they were in "pay or quit time;" (7) at that time, no money was paid or received; (8) during the 5-day period, no money was paid; (9) keys were not returned until August 2 when the keys were returned in the courtroom; and (10) nothing was given to Plaintiff to pay July rent.[38] The trial court asked the witness (1) if Plaintiff gave Defendants a receipt;[39] and (2) how

[28] *Id*. at 11:28:32–47.
[29] *Id*. at 11:28:48–11:29:02.
[30] *Id*. at 11:31:14–40.
[31] *Id*. at 11:31:51–56.
[32] *Id*. at 11:32:14–26.
[33] *Id*. at 11:33:43–54.
[34] *Id*. at 11:35:33–11:37:31.
[35] *Id*. at 11:37:35–40.
[36] *Id*. at 11:37:41–11:38:04.
[37] *Id*. at 11:41:02–11:42:07.
[38] *Id*. at 11:42:21–11:43:40.
[39] *Id*. at 11:43:41–53.

Defendant would know what the check was for.[40] Mrs. Sayegh responded Defendant did not request a receipt[41] and Defendants could have written what the payment was for on their check.[42] When the trial court pressed for a more definitive answer, Mrs. Sayegh responded (1) Defendants were told they had not paid their late fees in full; and (2) Plaintiff—Joseph—told them the check was for late fees when he accepted the check from them.[43]

On cross examination, Mrs. Sayegh stated Plaintiff did not accept the $400.00 as rent for July and re-iterated they accepted the $400.00 for the late fees for June.[44] She (1) stated Defendants were late every month since 2011; (2) clarified she would accept any payment until the 15th of the month; but (3) said Defendants did not pay their full rent.[45] She also stated that she provided a receipt whenever Defendants asked for one.[46]

The trial court took the matter under advisement and awarded Plaintiff $2,700.00 in back rent for July and for August, 2012; late charges of $1,500.00; house and carpet cleaning charges of $575.00; and court costs of $283.00 plus interest. Defendants filed a timely appeal. Plaintiff failed to file a responsive memorandum This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did Defendants Properly Present Their Issues On Appeal.

Defendants submitted a memorandum that neither cites to the record nor cites relevant authority. Accordingly, Defendants' appellate memorandum fails to comply with Rule 8(a)(3), Super. Ct. App. P.—Civil, which states:

> Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

When a litigant fails to include citations to the record in an appellate brief, the court may disregard the party's unsupported factual narrative and draw the facts from the opposing party's properly-documented brief and the record on appeal. *Arizona D.E.S. v. Redlon*, 215 Ariz. 13, 15, ¶ 2, 156 P.3d 430, 432, ¶ 2 (Ct. App. 2007). Allegations lacking specific references to the record do not warrant consideration on appeal absent fundamental error, *State v. Cookus*, 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977), which is rare in civil cases. *Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, ¶¶ 23–25, 118 P.3d 37, 42–43, ¶¶ 23–25 (Ct. App. 2005).[47]

[40] *Id*. at 11:43:53–56.
[41] *Id*. at 11:43:50–53.
[42] *Id*. at 11:43:53–11:44:40.
[43] *Id*. at 11:44:08–42.
[44] *Id*. at 11:45:00–11.
[45] *Id*. at 11:46:15–36.
[46] *Id*. at 11:46:11–11:48:09.
[47] Courts apply the fundamental error doctrine sparingly. Fundamental error goes to the case's very foundation that prevents a party from receiving a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 ¶ 19 (2005).

In this case, Defendants failed to clearly articulate their issues. However, SCRAP—Civ. Rule 8(a)(5) provides the Superior Court may "modify or waive the requirements of this rule to insure a fair and just determination of the appeal." Although Defendants' brief is inadequate, this Court determines that—in order to insure a fair and just determination of the appeal—this Court will waive compliance with SCRAP—Civ. Rule 8(a)(3).

B. Did Plaintiff File A Defective 5-Day Notice.

Defendants allege—for the first time on appeal—that Plaintiff filed a defective 5-day Notice. Failure to raise an issue at trial results in waiver of that issue. In *Dillig v. Fisher*, 142 Ariz. 47, 51, 688 P.2d 693, 697 (Ct. App. 1984) the Arizona Court of Appeals ruled a litigant is foreclosed from raising an issue for the first time on appeal. In *Payne v. Payne*, 12 Ariz. App. 434, 435-36, 471 P.2d 319, 320-21 (1970) the Arizona Court of Appeals held:

> Turning now to the second reason, we state the general law in Arizona that a party must timely present his legal theories to the trial court so as to give the trial court an opportunity to rule properly. *Gustafson v. Riggs*, 10 Ariz. App. 74, 456 P.2d 92 (1969); *Weston v. State ex rel. Eyman*, 8 Ariz. App. 58, 442 P.2d 881 (1968). The courts in Arizona have also held that a matter raised for the first time on appeal will not be considered. *Quila v. Estate of Schafer*, 7 Ariz. App. 301, 438 P.2d 770 (1968); *Kenyon v. Kenyon*, 5 Ariz. App. 267, 425 P.2d 578 (1967).

Because Defendants failed to raise this argument with the trial court, they are foreclosed from raising it now.

On appeal, Defendants claimed "the concepts of waiver and estoppel are not in play"[48] Defendants did not specify why waiver and estoppel were inappropriate. Instead, they asserted they were "entitled to their rights granted by the Statutes and the Rules."[49] As stated in the preceding section, fundamental error is rare in civil cases. The trial court is not an advocate for either party. Unfortunately for Defendants, pro se litigants are held to the same legal standard as attorneys. In *In re Marriage of Williams*, 219 Ariz. 546, 549, ¶ 13, 200 P.3d 1043, 1046 ¶ 13 (Ct. App. 2008) the Arizona Court of Appeals held:

> Parties who choose to represent themselves "are entitled to no more consideration than if they had been represented by counsel" and are held to the same standards as attorneys with respect to "familiarity with required procedures and . . . notice of statutes and local rules." A party's ignorance of the law is not an excuse for failing to comply with it.

[Citations omitted.] Similarly, in *Higgins v. Higgins*, 194 Ariz. 266, 279, 981 P.2d 134, 138 (Ct. App. 1999) the Court ruled:

. . . .

[48] Appellants' Memoranda [sic.] at page 3. Because Defendants failed to use lined paper, references to this memorandum will only refer to page numbers.
[49] *Id*. at p. 3.

> One who represents herself in civil litigation is given the same consideration on appeal as one who has been represented by counsel. She is held to the same familiarity with court procedures and the same notice of statutes, rules, and legal principles as is expected of a lawyer.

[Citations omitted.] Accord, *Kelly v. NationsBanc. Mortg. Corp*., 199 Ariz. 284, 287, ¶ 16, 17 P.3d 790, 793, ¶ 16 (Ct. App. 2001).

Our courts have discussed fundamental error and determined it occurs when a litigant is so restricted in presenting his or her position that the litigant lacks a meaningful opportunity to be heard. Fundamental error goes to the case's very foundation that prevents a party from receiving a fair trial. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 ¶ 19 (2005). This violates constitutionally mandated due process guaranteed by the Fourteenth Amendment of the United States Constitution, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652 (1950) and Article 2, Section 4 of the Arizona Constitution. Here, however, Defendants were provided the opportunity to be heard, present witnesses, and cross-examine the Plaintiff's witness. Defendants knew the date when Plaintiff filed the 5-Day Notice as well as the date when the Summons was issued. Defendants could have presented their 4-Day Notice claim to the trial court so the trial court could rule on this claim. Defendants failed to do so. Effectively, Defendants employed one trial strategy and, when it was unsuccessful, now ask this Court to invalidate the trial court's determination under the guise of the trial court's obligation to follow the rules and statutes.

It is the litigants duty to inform the trial court of the rules and statutes each litigant asserts relate to the case and not the trial court's obligation to "enforce the rules and legislation adopted by the Arizona Supreme Court and Arizona Legislature"[50] sua sponte. Had Defendants alerted the trial court to this claim, the trial court would have been obligated to consider it. However, the trial court is not required to search through the file and calculate the dates to find if any party made an error—mathematical or otherwise—that might result in a statutory or rules violation.

C. Was The 5-Day Notice Revoked When Plaintiff Also Filed a Notice Of Non-Renewal Of Lease.

Plaintiff filed two separate notices on the same day—July 20, 2012. One notice informed Defendants they had 5 days in which to fully satisfy their rental obligation or they would be evicted. The second notice told Defendants they would be unable to renew their lease once the leasehold ended on August 31, 2012. These are separate and independent notices. Defendant provided no authority indicating a landlord's decision to end a lease after the term expired was the same as requiring the tenant to pay rent during the lease period. These notices refer to independent actions and consequences. The notice of non-renewal allows the tenants to plan for the future because tenants are informed the lease will not be renewed. Unless the contract provides the tenant with a right to renew, the tenant is not guaranteed the right to renew the lease. Alternately, the 5-Day Notice tells the tenant they must pay the rent or move out almost immediately—within the 5 days specified—or the landlord will file an eviction action. Because one notice deals with the almost immediate occupancy and the other notice refers to future rights

[50] *Id*. at p. 5.

to lease, these notices are not the same. Contrary to Defendants' position, nothing in the Notice of Non-Renewal of Lease guaranteed Defendants the right to remain on the premises without paying rent once the landlord filed an eviction action. Defendants provided this Court with no authority supporting their position.

Nor does this Court find Plaintiff "actually set up a contract of renewal with Defendants to stay through August despite the eviction process"[51] as Defendants allege. Plaintiff already had a contract and did not need to set up a contract of "renewal." Furthermore, despite Defendants' assertions to the contrary, Plaintiff (1) did not file a forcible detainer; and (2) this dispute was not required to be tried "in an ordinary civil action." Instead, Plaintiff filed a special detainer action for possession of the premises and past due rent. The trial court confirmed these parameters at the outset of the hearing.

Defendants correctly stated contract interpretation is beyond the scope of a detainer action:

> The reason for denying counterclaims and the like and limiting judgment only to possession, costs, and recovery for unpaid rent is to preserve the proceeding as a summary remedy. Allowing other claims would increase the issues and protract the action.

Gangadean v. Erickson, 17 Ariz. App. 131, 134, 495 P.2d 1338, 1341 (Ct. App. 1972) and

> The only issue to be decided in the action is the right of actual possession. Thus the only appropriate judgment is the dismissal of the complaint or the grant of possession to the plaintiff. A real dispute regarding a landlord-tenant relationship must be tried in an "ordinary civil action, in which time periods are not accelerated, counter- and cross claims are allowed, and there is an opportunity for discovery."

United Effort Plan Trust v. Holm, 209 Ariz. 347, 350–51, ¶ 21, 101 P.3d 641, 644–45, ¶ 21 (Ct. App. 2004). However, contract issues were not the scope of (1) the hearing; or (2) the trial court's decision. Instead, the trial court ruled on possession and the payment for past due rent and leasehold expenses and, appropriately, did not consider issues about Defendant's security deposit or Plaintiff's claims about additional damage to the premises requiring repainting, replacement of screens and faucets, and an unpaid water bill which must be tried in "an ordinary civil action."

D. Did The Trial Court Make Inconsistent Rulings.

Defendants were granted a second trial in this matter. When the second trial was granted, the results of the first trial were set aside.[52] According to Defendant, the trial court only allowed a maximum late fee of $135.00 during the first trial on August 3, 2012. At the conclusion of the current trial, the trial court determined the $50.00 per day late fee was appropriate. This Court is not privy to the trial court's views about late fees. However, the contract Defendants signed allowed for the imposition of a $50.00 per day late fee. Defendants alleged these rulings are inconsistent.

[51] *Id*. at p. 6.

[52] Minute Entry of August 31, 2012, ruling: "The procedural history of this case is problematic. The most appropriate remedy is to set aside this judgment entered on August 3, 2012 [sic.] and set the case for a new trial."

When the trial court grants a new trial, and sets aside a prior proceeding, the rulings from the prior proceeding no longer have force and effect. In *Nielson v. Patterson*, 204 Ariz. 530, 533, ¶ 12, 65 P.3d 911, 914, ¶ 12 (2003) the Arizona Supreme Court stated:

> Our resolution of this issue largely turns upon whether we interpret the effect of the trial court's order granting a new trial as vacating or merely suspending the original judgment. A vacated judgment lacks force or effect and places parties in the position they occupied before entry of the judgment. *Illinois v. Eidel,* 319 Ill.App.3d 496, 253 Ill. Dec. 613, 745 N.E.2d 736, 744 (2001) ("The vacatur restores the parties to the status quo *ante,* as though the trial court judgment had never been entered."); *see State v. Cramer,* 192 Ariz. 150, 153 ¶ 16, 962 P.2d 224, 227 (App.1998) (holding that a voidable judgment "is binding and enforceable and has all the ordinary attributes of a valid judgment until it is reversed or vacated"). If the trial court order truly vacated the original judgment, nothing remained of the judgment for the Smiths to challenge. Therefore, their time to appeal could not begin to run until, following issuance of the court of appeals' mandate, the trial court reinstated the judgment. On the other hand, if the order granting a new trial only suspended the original judgment pending the new trial, then the Neilsons' view would prevail. Because we view a vacated judgment as lacking force or effect, we regard the Smiths' approach as more in keeping with our traditional view of the status of a vacated judgment. *Cramer,* 192 Ariz. at 153 ¶ 16, 962 P.2d at 227.

Because the order setting a new trial vacated the prior judgment, nothing remained from the prior judgment and the trial court was not required to adhere to its prior rulings.

The lease for the premises specifically allows for a $50.00 per day late fee. That provision, which was initialed by Defendants states:

> Tenant shall pay as rent the sum of $1,350.00 per month, due and payable monthly, in advance, no later than 5:00 p.m. by the 3 day of every month. Tenant further agrees to pay a late charge of $50.00 for each day rent is not received after the forth [sic.] of the month to the Landlord regardless of the cause, including dishonored checks, time being of the essence. An additional Service Charge of $35.00 will be paid to Landlord for all dishonored checks. . . .

Defendants agreed to the $50.00 per day late fee in the lease. Additionally, they failed to challenge the late fee during the trial and therefore waived their objection to the fee.

E. Did The Trial Court Err In Calculating The Amount Of Late Fees.

Defendants allege the trial court miscalculated the amount of late fees as late fees did not begin until the fifth day of the month. The first $50.00 late fee became due and payable on July 5, 2012. There were 26 additional days at $50.00 per day. The total late fee for July should have been $1,350.00. However, Defendants did not officially move until August 2, when they returned the key. This added an additional two days or $100.00 to the late fees as July rent still was not

paid. Therefore, the total late fee for the July payment should have been $1450.00. Because the trial court assessed Defendants $1,500.00 instead of $1450.00 for July rent, the trial court erred in its mathematical calculation.

F. Did Defendants Make A Partial Rent Payment In July.

Defendants claimed their $400.00 July payment was a partial rental payment. Plaintiff alleged the payment was a payment for the June obligation. The check does not indicate if it was for July rent or June late fees. The evidence conflicts. In addressing the subject of conflicting evidence, our Supreme Court said the appellate courts resolve any conflict by sustaining the decision of the trial court. The Supreme Court held:

> We review a sufficiency of the evidence claim by determining "whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." Substantial evidence is proof that "reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict."

State v. Bearup, 221 Ariz. 163, 167, ¶ 16, 211 P.3d 684, 688, ¶ 16 (2009) (citations omitted). In this case, the trial court was presented with conflicting evidence about whether the $400.00 July payment was (1) a partial rental payment which the landlord accepted; or (2) repayment for late fees attributable to June rent. It was left to the trial court to consider which litigant to believe. Because the testimony about the July payments conflicts, this is a discretionary determination. In addressing the role of the appellate court when reviewing conflicting evidence the Arizona Supreme Court held:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

. . . .

. . . .

. . . .

. . . .

State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Here, the trial court had the authority to decide the facts. Absent compelling proof as to how the trial court erred, this Court must sustain the trial court's determination. The trial court had the opportunity to see the parties and witnesses and to evaluate their testimony. These are "procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge." Because this is a discretionary determination, this Court concludes the trial court correctly determined Plaintiff failed to receive payments for July rent.

G. Did The Trial Court Err By Not Considering Defendants' Security Deposit In Calculating Past Due Rent.

Defendants also argued the trial court erred in failing to consider the security deposit in calculating past due rent. Not only was security deposit specifically addressed in the lease—where it stated it could not be used for rent[53]—issues about security deposits and damage to the home go beyond detainer actions and—as stated in earlier portions of this opinion—must be addressed in civil actions. Furthermore, Defendants failed to raise any issues about the security deposit during the trial and therefore waived any claim they might otherwise have had.

H. Did The Trial Court Err By Including August Rent.

Defendants alleged the trial court erred by awarding Plaintiff August rent "on both Judgments" and attempted to bootstrap this award into a determination that this is tantamount to ruling Plaintiff allowed Defendants the right to possess the property through August. As previously stated, the first Judgment has no force and effect because it was set aside. The second Judgment reflects August rent because the trial court found Defendants held over into August. Defendants argued that filing the "forcible detainer action" terminated the lease. They provided no authority for this claim. Defendants claimed they vacated the property in July. They did not dispute that the keys were not returned until August. Plaintiff's witness testified the key was returned in the courtroom on August 2. A.R.S. § 33–1310(3) states:

> "Delivery of possession" means returning dwelling unit keys to the landlord and vacating the premises.

Because (1) the keys were not returned prior to the August 1; and (2) the lease required payment on the first of the month the August rent was due and payable. Therefore, Defendants could be assessed the costs for the August rent.

. . . .

. . . .

. . . .

. . . .

[53] The lease provision states: "Tenant agrees to pay a Security Deposit of $1,000.00 to bind tenant's pledge of full compliance with the terms of this agreement. NOTE: Security Deposit may not be used to pay rent! Any damages not previously reported as required in paragraph 25, will be repaired at Tenant's expense."

III. CONCLUSION.

Based on the foregoing, this Court concludes the Manistee Justice Court erred in calculating the amount for the late payments for July rent. The late payment should have been for $1,450.00 and not the $1,500.00 the trial court ordered. The trial court did not err in its other rulings.

IT IS THEREFORE ORDERED affirming in part and reversing in part the judgment of the Manistee Justice Court.

IT IS FURTHER ORDERED modifying the trial court's judgment to reflect (1) late fees of $1,450.00 and (2) the total amount of judgment as $5,008.00.

IT IS FURTHER ORDERED remanding this matter to the Manistee Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 041820120730